

SECOND APPEAL NO.648 OF 2005

PC :

1. The appellant instituted a suit for declaration that the sale deed executed by the defendant nos.1, 3 and 4 in favour of defendant no.5 is null and void. A further declaration was sought that the plaintiff is the absolute owner of the suit property conveyed under the said sale deed. Both the Courts below have held that the plaintiff has failed to establish that his father Vithoba was the exclusive owner of the suit property and that the plaintiff is the exclusive owner of the property. The suit came to be dismissed by the Trial Court and the appeal filed

by the present appellant is also dismissed by the First Appellate Court. The First Appellate Court has concurred with the view taken by the Trial Court.

2. Inviting my attention to the observations made by the First Appellate Court it is submitted that as it was revealed that the father of the plaintiff was an co-owner of the property along with his brothers, the Court should have passed a decree for partition and separate possession by having recourse to Order XLI, Rule 33 of the code of Civil Procedure. The First Appellate Court has rejected the said contention. It is relevant to note that neither there is any prayer made in the plaint for partition and separate possession nor such a prayer was made when the appeal came to be filed. For the first time during the course of arguments the learned counsel for the appellant seems to have put forth the said contention. The record reveals that the respondent nos.1, 3 and 4 have not contested the matter, may be for the reason that no prayer for partition and separate possession was made. In the absence of any pleading, it is not possible to consider the claim of the appellant for partition and separate possession for the first

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time in the second appeal.

3. No substantial question of law emerges for consideration. Hence, the Second Appeal is summarily dismissed.

(A.P.DESHPANDE, J.)